

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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STATE OF CALIFORNIA

In re:) 1998 OAL Determination No. 24
Request for Regulatory)
Determination filed by) [Docket No. 91-029]
MIKAEL A. SCHIOLD)
regarding a policy of the) October 1, 1998
BOARD OF PRISON TERMS)
precluding transfer to) Determination Pursuant to
foreign prisons of inmates) Government Code Section
without parole release) 11340.5; Title 1, California
dates¹) Code of Regulations,
) Chapter 1, Article 3
)
_____)

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
CINDY PARKER, Administrative Law Judge
on Special Assignment
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether a policy of the Board of Prison Terms precluding transfers of alien inmates to prisons in foreign countries until parole release dates have been established is a "regulation" and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

OAL has concluded that the policy is a "regulation." If the Board of Prison Terms wishes to exercise its discretion to issue rules governing transfer of alien inmates to prisons in foreign countries, it must adopt regulations pursuant to the APA.

ISSUE

OAL has been requested to determine whether a policy of the Board of Prison Terms ("Board") is a "regulation" required to be adopted pursuant to the APA.² The policy consists of precluding the transfer of alien inmates to prisons in other countries under a prisoner transfer treaty until they have received parole release dates. Mikael A. Schiold filed this request as an inmate at Mule Creek State Prison in Ione. This determination addresses the sole issue of whether the policy is required to be adopted pursuant to the APA. The issue of whether the requester is entitled to transfer to a prison in Sweden is not within OAL's jurisdiction.

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE BOARD OF PRISON TERMS' QUASI-LEGISLATIVE ENACTMENTS?

The California Board of Prison Terms meets periodically concerning parole matters at each prison.³

Penal Code sections 3040, 5076.1 and 5077 provide that the Board shall hear parole applications, shall have the power to grant parole, and shall determine parole length, conditions, and whether revocation is appropriate. The Board must establish criteria for the setting of parole release dates under Penal Code section 3041.

Penal Code section 5076.2, subdivision (a), provides in part:

"Any rules and regulations, including any resolutions and *policy statements*, promulgated by the Board of Prison Terms, *shall be promulgated and filed pursuant to [the APA] . . .*" (Emphasis added.)

Clearly, the APA generally applies to the Board's quasi-legislative enactments.⁴

II. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

"... *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['regulation'] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,⁵ the California Court of Appeal upheld OAL's two-part test⁶ as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule satisfies both parts of the two part test, OAL must conclude that it is a "regulation" and subject to the APA. In applying the two-part test, OAL is mindful of the admonition of the *Grier* court:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.*" (Emphasis added.)⁷

Background

On May 14, 1985, the United States entered into a treaty with numerous other nations regarding the transfer of prisoners between countries. The treaty was entitled "The Council of Europe Convention on the Transfer of Sentenced Persons," also known as the "Strasbourg Convention" (hereafter "the treaty"). Under the provisions of the treaty, a prisoner may transfer to the prison of another country in order to serve the sentence imposed on the prisoner if certain conditions are met.⁸ The conditions are set forth in section II.B. of this determination.

Authority to give approval of the State of California for such transfers is granted to the Governor or his designee.⁹ The Governor has delegated authority to approve such transfers to the Chairman of the Board of Prison Terms.¹⁰

As mentioned above, the Board also has the power to grant release upon parole.¹¹ Prisoners sentenced to life imprisonment for first or second degree murder committed on or after November 8, 1978 must serve at least seven years of imprisonment prior to parole release.¹² After three years of imprisonment, the Board holds "documentation hearings" to review the prisoner's activities and conduct and to document activities and conduct pertinent to granting or withholding post-conviction credit.¹³ One year before the minimum eligible

parole date, the Board holds an "Initial Parole Hearing" or parole consideration hearing to consider whether a parole date should be set.¹⁴ Normally, a parole release date is set at that hearing unless the Board determines that public safety requires a more lengthy incarceration based upon the gravity of the current convicted offense and the timing and gravity of past convicted offenses.¹⁵ When a parole date is denied, the Board may defer subsequent parole hearings for more than one year based upon specified criteria. After a parole date is set, progress hearings are held to determine whether a previously set parole date should be advanced.¹⁶

The requester was sentenced to life imprisonment for second degree murder. He began serving his sentence on June 3, 1986.

Since 1986, the requester has asked several times for transfer to a prison in Sweden, his country of origin. His requests have been denied. He alleges that the denials were *based upon* the Board's policy of denying transfer to foreign prisons until parole dates are established. OAL takes no position on the validity of this allegation concerning the basis of the various denial decisions.

After one of the denials, the requester's attorney was informed that:

"The Board of Prison Terms takes this responsibility very seriously and has a longstanding *policy . . . precluding transfer* until an individual has been found suitable for parole."¹⁷

OAL notes that this official statement uses the term "policy" to describe the rule under discussion here. As noted above, in Penal Code section 5076.2, subdivision (a), the Legislature has expressly directed the Board of Prisons Terms to promulgate and file any "policy statements" pursuant to the APA.

One of the denials advised that it would be appropriate for the requester to submit an application for transfer once the Board determined that the requester was suitable for parole and a specific parole date had been set.¹⁸

In another official statement, the Consul General of Sweden was informed that:

"The Transfer Treaty Program is administered by the Board of Prison Terms. It is the *policy* of the Chairman of the Board of Prison Terms not to

allow prisoners serving indeterminate life sentences, without established release dates, to transfer to prisons in foreign countries” (Emphasis added.).¹⁹

In 1992, the requester filed a petition for writ of habeas corpus in the Superior Court alleging a denial of due process and a failure by the Board of Prison Terms to adopt appropriate regulations for deciding on requests for transfers to foreign prisons based on existing treaties. The court ruled in favor of the requester, finding that the Board or its Chairman:

“... has a *policy* of refusing to approve transfers for prisoners whose release dates have not been set” and “has developed a *policy* regarding categories of inmates that it considers ineligible for transfer. This *policy* has the effect of rewriting the treaty by making ineligible a category of inmates that the treaty expressly makes eligible. The *policy* is, therefore, incompatible with the statutory directive [in Government Code section 12012.1] that the designee act ‘as provided in the treaty’.” (Emphasis added.)²⁰

The court ultimately ordered the Board to reconsider the requester’s transfer based upon the criteria in the treaty and not upon the Board’s policy which revised the treaty.²¹

Pursuant to the court order, the Board reconsidered its decision and again denied the transfer in September 1993. The denial was based upon the magnitude of violence involved in the crime for which the requester was sentenced, his social and criminal history, psychological factors, institutional adjustment, the fact that he was sentenced to a term of 15 years to life and that his minimum eligible parole date was not until January 5, 1995.²² (Emphasis added)

A second petition for writ of habeas corpus was filed in 1994, challenging the September 1993 decision. The Sacramento Superior Court denied the petition, finding that the 1993 decision was made “by considering Petitioner’s entire case file as well as lack of a parole date.”²³

In the context of a request for determination, OAL’s authority is limited to determining whether such a policy has been issued or utilized in violation of the *statutory prohibition against state agency use of “underground regulations,” Government Code section 11340.5*. OAL cannot and does not rule upon the

factual issue of whether the transfer denials were based on the challenged policy. Similarly, OAL cannot and does not rule upon the issue of whether the requester is entitled to transfer to a prison in Sweden. In the determination context, OAL cannot and does not rule upon the issue of whether the challenged policy is inconsistent with the treaty or Government Code section 12012.1.

In its response to the request for determination, the Board admits that, in addition to other factors, it considers "... the term that the foreign country will impose if the prisoner is transferred"²⁴ in deciding whether to grant a transfer to a foreign prison. In its response to the request for determination, however, the Board states:

"Each request that is filed by a foreign prisoner is individually processed by the Chairman of the Board of Prison Terms and judged on its individual merits. Consequently, the allegation that the Chairman of the Board of Prison Terms has an unwritten policy not to allow for the transfer of foreign prisoners prior to the granting of a parole date is without merit."²⁵

A. IS THE CHALLENGED RULE A "STANDARD OF GENERAL APPLICATION?"

The requester has stated that the Board has an unwritten rule or policy precluding the transfer of prisoners to foreign prisons prior to the granting of a parole date. Documents submitted to OAL in this proceeding clearly indicate that such a policy was used by the Board in the early 1990's. This material includes documents submitted to the Sacramento Superior Court in 1992-93 litigation, litigation which resulted in a preliminary finding that the preclusion policy violated the APA. The final Superior Court decision stated:

"The facts presented by the petitioner [Mikael Schiold], *and not contested by the respondent [the Board of Prison Terms]*, indicate that the designee, whether the Board or Mr. Gillis [then Chairman], has a policy of refusing to approve transfers for prisoners whose release dates have not been set."
(Emphasis added.)²⁶

For the purposes of this determination, and for the reasons outlined above, OAL (following the Superior Court) will assume that the policy exists--or at least did exist on the date the request for determination was filed.

OAL next considers whether the challenged rule is one of general application.

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.²⁷ The Board's policy on transfer to foreign prisons is just such a rule. It is intended to apply to all members of a class, i.e., all prisoners seeking transfer to foreign prisons. Therefore, OAL concludes that the challenged rule is one of general application.

B. DOES THE CHALLENGED RULE INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?

The treaty in question provides that prisoners may transfer to a prison in a foreign country, provided certain requirements are met. The term "sentencing state" means the nation in which the sentence was imposed on the person who may be or has been transferred. "Administering state" means the nation to which the sentenced person may be, or has been transferred, in order to serve his sentence.²⁸ A prisoner may be transferred to a foreign prison:

- "a. if that [sentenced] person is a national of the administering State;
- b. if the judgment is final;
- c. if, at the time of receipt of the request for transfer, the sentenced person still has at least six months of the sentence to serve or if the sentence is indeterminate;
- d. if the transfer is consented to by the sentenced person or, where in view of his age or his physical or mental condition one of the two States considers it necessary, by the sentenced person's legal representative;
- e. if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory; and

f. *if the sentencing and administering States agree to the transfer.*”(Emphasis added.)

The sentencing “state” under the treaty in the requester’s case is the United States.

Article I, section 10, clause 1 of the United States Constitution provides in part that “[n]o state shall enter into any *Treaty*, Alliance, or Confederation” (Emphasis added.)

Article II, section 2, clause 2 of the United States Constitution provides in part that the President of the United States “shall have Power, by and with the Advice and Consent of the Senate to make *Treaties*, provided two-thirds of the Senators present concur” (Emphasis added.)

Article VI, clause 2 of the United States Constitution provides:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made*, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” (Emphasis added.)

The treaty-making power has thus been ceded by each of the 50 states to the United States.²⁹ Treaties “made by the United States, and in force, are part of the supreme law of the land, and . . . are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States.”³⁰ Every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual state.³¹ A Consular Convention, such as the Hague Convention, has the status of a treaty and consequently is the supreme law of the land.³²

The federal Transfer of Offenders to and from Foreign Countries Act (“Transfer of Offenders Act”) authorizes the Attorney General of the United States to implement the treaty in question. Section 4102 of that Act authorizes the U.S. Attorney General to make arrangements by agreement with each of the 50 states for the transfer of offenders in state custody to the foreign countries of which the offenders are citizens or nationals.³³

The California Legislature recognized the supremacy of treaties such as the one in question when it enacted section 12012.1 of the California Government Code, which provides:

“Whenever a treaty is in force providing for the transfer of offenders between the United States and a foreign country, *the Governor or his designee is authorized to give the approval of the state* to a transfer as provided in the treaty, upon the application of a person under the jurisdiction of the Department of Corrections, the Department of the Youth Authority, and the State Department of Health Services.” (Emphasis added.)

Section 12012.1 gives the Governor or his designee the power to approve or deny inmate applications for transfer to foreign prisons. No limits are placed on the exercise of this power: thus, it is within the discretion of the Governor or his designee to approve or deny transfer applications. The Governor has delegated this authority to the Chairman of the Board of Prison Terms in a document stating the following:³⁴

“I hereby delegate to John Gillis, *Chairman, Board of Prison Terms*, my duties and obligations of performance pursuant to Government Code section 12012.1 concerning the approval of applications for transfer to foreign countries of persons under the jurisdiction of the Department of Corrections” (Emphasis added.)³⁵

A federal statute delegates to the Attorney General of the United States the authority to act on behalf of the United States to agree to a prisoner transfer under the treaty.³⁶ The same statute states that the Attorney General may make arrangements “by agreement” with each of the 50 states for the transfer of offenders in state custody to the foreign countries of which the offenders are citizens or nationals. A California statute, in turn, provides that the Governor (or his designee) is authorized to act on behalf of the State of California. The Governor of California has, in turn, delegated this authority to the Chairman of the Board of Prison Terms.

The treaty itself requires the consent of the sentencing state to the transfer, but does not limit the discretion of the sentencing state to approve or deny the transfer. Nothing in the treaty, the federal statute, or Government Code section 12012.1 limits the discretion of the Board in approving or denying a transfer.

The duly adopted regulations of the Board of Prison Terms governing the requester and prisoners similarly situated contain criteria the Board is authorized to use for establishing the requester's term and parole release date.³⁷ There is no reference in the regulations to transfers to foreign prisons.

On several occasions since 1991, the Board has considered and denied the requester's application to transfer to a prison in Sweden. From the fact that the Board considered the transfer application, OAL infers that the requester was found to have met all of the minimum transfer requirements in the treaty, except for having the consent of California, which was delegated the authority of the Federal government to approve or deny the transfer. Since section 12012.1 of the California Government Code does not require that inmates seeking transfer have established parole dates, the preclusion policy implements, interprets, and makes specific that statute. Therefore, as of the time of the request for determination in 1991, OAL concludes that the challenged policy is a "regulation" which is without legal effect unless adopted in compliance with the APA.

OAL will next examine whether the challenged policy is a "regulation" as of the date this determination is issued.

In 1994 the California Legislature adopted Penal Code section 2912 which provided in part:

"(a) Under its Foreign Prisoner Transfer Program, the Board of Prison Terms shall devise a method of notifying each undocumented felon in a prison or reception center operated by the Department of Corrections that he or she may be eligible to serve his or her term of imprisonment in his or her country of origin as provided in federal treaties.

"(b)(1) The Board of Prison Terms shall actively encourage each eligible undocumented felon to apply for return to his or her country of origin as provided in federal treaties"³⁸

According to the Board, the requester entered the United States on a three-month visa which expired, and he never applied for an alien registration card.³⁹

The Legislature stated its intent with regard to transfers to foreign prisons as follows:

"It is the intent of the Legislature in enacting this act that no prisoner shall be returned to any foreign nation unless the federal government has received guarantees from that foreign nation that the prisoner will be imprisoned to serve the remainder of his or her prison term in that foreign nation."⁴⁰

While the Board's preclusion policy is arguably consistent with the legislative intent of Penal Code section 2912 it, nonetheless, interprets section 2912 in addition to California Government Code Section 12012.1. Previously OAL concluded that the Board's preclusion policy was a "regulation" as of the date of the request for determination in 1991. OAL further concludes that as of the date of this determination, despite the intervening statutory changes, if the Board has a preclusion policy, then that policy continues to be a "regulation" without legal effect unless adopted in compliance with the APA.

III. DO THE COMPONENTS OF THE CHALLENGED RULE FOUND TO BE "REGULATIONS" FALL WITHIN ANY *GENERAL* EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

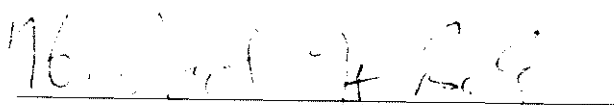
Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.⁴¹ Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.⁴²

The issue of the applicability of exceptions to APA requirements was not raised by either the requester or the Board. OAL's independent review discloses no applicable exceptions.

CONCLUSION

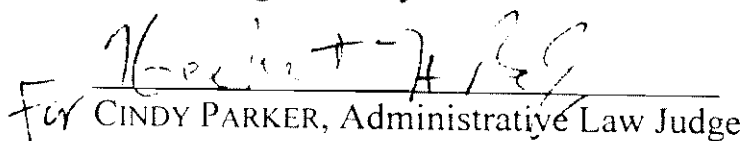
For the reasons set forth, OAL finds that the challenged policy is a "regulation" which is without legal effect unless adopted in compliance with the APA. OAL does not address the issue of whether a transfer should be granted to the petitioner as this issue is not within OAL's jurisdiction.

DATE: October 1, 1998



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ENDNOTES

1. This Request for Determination was filed by Mikael A. Schiold, who, at the time of filing, was incarcerated at Mule Creek State Prison in Ione. The Department of Corrections was represented by Peggy McHenry of the Regulations and Policy Management Branch, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001, (916) 327-4270.
2. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act." [Emphasis added.]

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

3. Penal Code sections 5076.1 and 5077.
4. The APA would apply to the Board's rulemaking even if Penal Code section 5076.2, subdivision (a), did not expressly so provide. The APA applies generally to state agencies, as defined in Government Code section 11000, in the executive branch of Government, as prescribed in Government Code section 11342, subdivision (a).
5. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. A 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

The Tidewater court itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272

Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*

6. The *Grier* Court stated:

“The OAL’s analysis set forth a two-part test: ‘First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency’s procedure?’ (1987 OAL Determination No. 10, *supra*, slip op’n., at p. 8.)”

OAL’s wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was published in *California Regulatory Notice Register* 96, No. 8-Z, February 23, 1996, p. 292. 1987 OAL Determination No. 10, *supra*, slip op’n., at p. 8.)

7. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

8. The Convention which negotiated the treaty was completed on March 21, 1983. The U.S. Senate ratified the treaty on June 28, 1984. President Reagan signed it on July 17, 1984. It became effective on July 1, 1985.

9. Government Code section 12012.1

10. June 28, 1988 letter from Governor’s Legal Affairs Secretary to Gary M. Cohen; July 15, 1991 letter from Governor’s Deputy Legal Affairs Secretary to the Consul General of Sweden; and July 26, 1993 Order in Sacramento Superior Court Case No. 113182.

11. Penal Code section 3030.

12. Penal Code section 3046.

13. Section 2269.1, Title 15, CCR.

14. Penal Code section 3041; Section 2268, Title 15, CCR.

15. Penal Code section 3041.

16. Section 2269, Title 15, CCR.

17. June 28, 1988 letter from Governor’s Legal Affairs Secretary to Gary M. Cohen.

18. June 4, 1991 letter from P. Sigman, Correctional Counselor I, to Inmate Schiold and June 28, 1998 letter from Governor’s Legal Affairs Secretary to Gary M. Cohen.

19. July 15, 1991 letter from Governor's Deputy Legal Affairs Secretary to Consul General of Sweden.
20. July 26, 1993 Order in Sacramento Superior Court Case No. 113182.
21. July 26, 1993 Order in Sacramento Superior Court Case No. 113182.
22. September 15, 1993 letter from Board Chairman to Mr. Mikael A. Schiold.
23. In re Schiold (Sacramento Superior Court, No. 94F02502), Memorandum and Ruling on Petition for Writ of Habeas Corpus, Aug. 24, 1994, p. 5.
24. Agency response, p.2
25. Agency response, pp. 1-2.
26. July 26, 1993 Order in Sacramento Superior Court Case No. 113182, p. 7.
27. *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App. 3d 622, 167 Cal.Rptr. 552.
28. The Council of Europe Convention on the Transfer of Sentenced Persons, March 21, 1983, 35 U.S.T. 2867, T.I.A.S. 10824, Articles I and III. (After December 31, 1949 treaties are cited to "United States Treaties and Other Agreements" (U.S.T.). Parallel citation is to the Department of State's collection, which is divided into three series: Treaty Series (T.S.) 1908-1945, Executive Agreement Series (E.A.S.) 1929-1945, and Treaties and Other International Acts Series (T.I.A.S.), 1945 to date.
29. *Baldwin v. Franks* (1887)120 U.S. 678; 7 S.Ct. 656, 657; 30 L.Ed. 766.
30. *Baldwin v. Franks* (1887)120 U.S. 678; 7 S.Ct. 656, 657; 30 L.Ed. 766.
31. *Ware v. Hylton* (1796) 3 U.S. 199; 3 Dall. 199; 1 L.Ed. 568.
32. *Ex Parte Volkswagenwerk Aktiengesellschaft* (Ala.1983) 443 So.2d 880.
33. 18 U.S.C. sections 4100 et seq.
34. The Board response to the request for determination refers to two cases which upheld the Board's denial of transfer to a foreign prison based upon the fact that California was not a party nor the authority of a party to the applicable treaty between the U.S. and Canada and that even if the treaty applied, the prisoners had no absolute right to a transfer. *Hart v. Wilson*, 1996 WL 371430, 2 (N.D. Cal. June 25, 1996), citing *Hogan v. Koenig* (9th Cir.1990) 920 F.2d 6.

35. In re Mikael Schiold On Habeas Corpus (Sacramento Superior Court; July 26, 1993; No. 113182).
36. 18 U.S.C. section 4102.
37. Sections 2400-2411, Title 15, CCR.
38. Sections 2912 and 5025 of the Penal Code were enacted in 1994 as part of Senate Bill No. 1878. Stats. 1994, ch. 565. Section 5025 requires the Department of Corrections to refer possible undocumented felons to the Immigration and Naturalization Service for a determination of whether they are subject to deportation. If identified as undocumented felons, inmates are to be transferred to the custody of the U.S. Attorney General for appropriate action.
39. September 18, 1995 letter from Board Chairman to Ms. Gurnia Michaux Griffin.
40. Senate Bill No.1878 (1993-1994 Reg. Sess.) Section 2.
41. Government Code section 11346.
42. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec.11342, subd. (g).)
 - c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)
 - f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp.

